

BARKER v. PALMER.

1881

Nov. 15.

Practice—Time—County Court—Action to recover Lands—Delivery of Summons to Bailiff—County Court Rules, 1875, Order VIII., rule 7—Jurisdiction—Appeal—Prohibition.

By Order VIII. rule 7 of the County Court Rules, 1875, "the summons in an action brought to recover lands shall be delivered to the bailiff forty clear days at least before the return day, and shall be served thirty-five clear days before the return day thereof." The plaintiff in an action in the county court to recover lands delivered the summons to the bailiff thirty-nine clear days, and the bailiff served it upon the defendant thirty-eight clear days, before the return day. At the hearing the county court judge ruled that the service was good, and tried the case, giving judgment for the plaintiff:—

Held, that the provision in rule 7 with respect to the time of delivering the summons to the bailiff was obligatory, and not merely directory, and therefore that the judge ought not to have tried the case.

Held, also, that the defendant's proper remedy was to appeal from the judge's ruling, and not to apply for a prohibition against the issue of execution on the judgment.

CAUSE shewn against a rule for a new trial obtained by the defendant, by way of appeal from the ruling of the Judge of the County Court of Hertfordshire.

The plaintiff brought his action under s. 11 of the County Courts Act, 1867, to recover lands.

The summons was delivered to the bailiff for service on the 2nd of June, 1881, and was served by him upon the defendant on the following day.

The return day named in the summons was the 11th of July. At the trial the objection was taken for the defendant that the service of the summons was bad, and that the county court judge had no jurisdiction to hear the case, by reason of the plaintiff having failed to comply with the terms of rule 7 of Order VIII. of the County Court Rules, 1875, which requires the summons, in case of an action brought to recover lands, to be delivered to the bailiff forty clear days before the return day.

The judge overruled the objection and tried the case, giving judgment for the plaintiff.

Lindsell, for the plaintiff. First, the defendant's contention being that the county court judge had no jurisdiction to hear the

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case, his proper remedy was to apply for a prohibition against the issue of execution, and not to appeal from the judge's decision. The county court judge is entitled to be heard in the matter, and there is a right of appeal from the grant of a prohibition by this Court, of which right the plaintiff has been deprived through the defendant not having adopted his proper remedy. Secondly, the decision of the county court judge was right. The object of the first part of rule 7 is merely to allow the bailiff a sufficient time to effect service of the summons upon the defendant. Here the bailiff, having in fact served the summons thirty-five days before the return day, has waived compliance with the terms of the first part of the rule. [He cited *Liverpool United Gaslight Co. v. Overseers of the Poor of Everton* (1); and *Jackson v. Beaumont*. (2)]

Guiry, for the defendant, supported the rule. The judge's decision was on a matter of procedure incidental to the jurisdiction he had over the subject-matter of the action. An appeal is therefore the proper remedy. Prohibition only lies where a court acts without any jurisdiction over the subject-matter before it. The terms of Order VIII. rule 7, are express with respect to the times mentioned in the rule. There is no power to extend the time: *Brown v. Shaw* (3); *Tennant v. Rawlings* (4); and the Court cannot hold one part of the rule obligatory, and the other directory, where the language is the same in both. [He also referred to *Williams v. Swansea Canal Navigation Co.* (5)]

GROVE, J. I am of opinion that this appeal must be allowed. I think the county court judge was wrong in hearing the case. In construing Acts of Parliament, provisions which appear on the face of them obligatory, cannot, without strong reasons given, be held only directory. The rule is, that provisions with respect to time are always obligatory unless a power of extending the time is given to the Court, and there is no such power here. In the present case the latter part of rule 7 was complied with, but not the former. It is to be observed that the word "shall" is used with respect both to the time of delivery to the bailiff and of the

(1) Law Rep. 6 C. P. 414.

(3) 1 Ex. Div. 425.

(2) 11 Ex. 300.

(4) 4 C. P. D. 133.

(5) Law Rep. 3 Ex. 158.

service on the defendant. A reason is suggested for holding the rule to be directory merely in the one case and obligatory in the other; it is said that the period of forty days is fixed only in order to allow the bailiff a reasonable time to serve the summons, whilst the period of thirty-five days is fixed for the protection of the defendant. It is also said that the bailiff has in fact served the summons within the proper period, and therefore has waived compliance with the rule. It is impossible for the Court to speculate upon the reasons for legislation in the way suggested, or to dissect an Act of Parliament and say upon those reasons that part of an enactment is directory and part obligatory. The reasons suggested might be wholly wrong, and to act upon them here would be practically to abrogate the rule. The words of the rule are peremptory, and give no more discretion with respect to the delivery to the bailiff, than with respect to the service of the summons.

As to the defendant's remedy by prohibition, I do not think it necessarily follows that an appeal will not lie because there is a remedy by prohibition. There is a passage in Comyn's Digest (title Prohibition, bk. 7, D. p. 140), which, though perhaps it does not apply to every case, tends to shew that there may be an appeal even although prohibition will lie, and it would also appear, from the same authority, that the appeal takes precedence of the remedy by prohibition. The County Court Act, 1850 (s. 14), gives an appeal in the largest terms, where a party is dissatisfied with the direction or determination of the Court "in point of law." Therefore, assuming prohibition would lie, I see nothing here to take away the right of appeal. But I am inclined to think that the defendant has not a remedy by prohibition. I never heard that prohibition would lie where a question of time merely was involved. All the practice has been to the contrary. There is much in Comyn's Digest (tit. Prohibition) to shew that, in general, prohibition lies where a Court has acted without having any jurisdiction whatever over the subject-matter of the action. Here the county court judge had jurisdiction over the subject-matter, subject to certain rules with respect to time which were incident to that jurisdiction. I think, therefore, that prohibition does not lie here; that, even if it does, the defendant has a right

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1881 of appeal; that the county court judge was wrong in hearing the case, and that this rule should be made absolute.

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LOPES, J. I am of the same opinion. I think the true construction of rule 7 is, that the summons *must* be delivered to the bailiff forty clear days before the return day thereof, and *must* be served thirty-five clear days before the return day. It is impossible to hold that the latter part of the rule is obligatory and the former directory merely. I therefore think that the county court judge was wrong in proceeding to hear the case. The whole question being one of procedure, it appears to me that the judge's ruling was upon a matter of law incident to his jurisdiction, and that an appeal can therefore be brought.

Rule absolute.

Solicitors for plaintiff: *Philpot & Son, for Hawkins & Lindsell, Hitchin.*

Solicitors for defendant: *Brown & Woolnough, for Dunville, St. Albans.*

W. A.

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[IN THE COURT OF APPEAL.]

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF
ROCHDALE *v.* THE JUSTICES OF THE PEACE FOR THE COUNTY
OF LANCASTER.

Highway—Repair—Disturnpiked Roads—Main Roads—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 13.

The Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), by s. 13, enacts that any road which has "between the 31st of December, 1870, and the date of this Act ceased to be a turnpike road" . . . "shall be deemed to be a main road, and one half of the expenses incurred from and after the 29th of September, 1878, by the highway authority in the maintenance of such road, shall, as to every part thereof which is within the limits of any highway area be paid to the highway authority of such area by the county authority of the county in which such road is situate, out of the county rate."

The corporation of the town and borough of R., was the highway authority of the R. highway area. Under ss. 47-50 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), such portions of the turnpike roads entering R. as